UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL No. 1456
THIS DOCUMENT RELATES TO ALL ACTIONS.	Civil Action: 01-CV-12257-PBS Judge Patti B. Saris

PLAINTIFFS' MOTION FOR LEAVE TO FILE ONE-PAGE SUPPLEMENT TO THEIR SUR-REPLY IN OPPOSITION TO ASTRAZENECA'S MOTION FOR SUMMARY JUDGMENT DISCUSSING TWO DISCRETE ISSUES REQUESTED BY THE COURT

Plaintiffs, by their attorneys, respectfully request leave to file a one-page supplement to their Sur-Reply in Opposition to AstraZeneca's Motion for Summary Judgment Discussing Two Discrete Issues Before the Court ("Sur-Reply"). As grounds for this Motion plaintiffs state the following:

1. On Friday, May 26, 2006, plaintiffs filed their Sur-Reply [Docket No. 2610] in order to address two discrete issues raised by the Court at the May 23, 2006 summary judgment hearing. At the time they filed the Sur-Reply, plaintiffs did not yet have the benefit of a transcript of that hearing and therefore relied on their handwritten notes taken during that hearing (while oral argument was occurring) regarding the precise issues the Court wished plaintiffs to address.

2. Plaintiffs have since had the opportunity to review that transcript of that hearing. Upon reviewing it, plaintiffs were able to see that AstraZeneca's counsel represented that *PNR, Inc. v. Beacon Prop. Mgmt.*, 842 So. 2d 773 (Fla. 2003) ("*PNR*") and *Millennium Communs. & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256 (Fla. Dist. Ct.

App. 2000) ("*Millennium*") held that the Florida Deceptive Uniform Trade Practices Act ("FDUTPA") contained a requirement that a representation be "likely to affect consumer choice." At page 44 of the rough (ASCII) transcript, the following exchange occurs:

> THE COURT: So your point under Florida law is, there's nothing here that could have affected consumer choice?
>
> MR. WISE: Correct, "likely to affect consumer choice."
>
> THE COURT: And that comes out of the statute?
>
> MR. WISE: Yes, and a case called Millennium and another case called PNR in the Florida courts, Page 14 and 15 of our brief.

See Rough transcript of May 23, 2006 summary judgment hearing, attached as Exhibit A hereto. When plaintiffs filed their Sur-reply, they did not recall AstraZeneca's specific reliance on those two cases at oral argument.

3. Neither *PNR* nor *Millennium* say anything about consumer choice. Indeed, the word "choice" does not appear anywhere in either opinion. Nowhere in the FDUTPA do the terms "consumer choice" appear. Instead, AstraZeneca's counsel was quoting from *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (F.T.C. 1984), a Federal Trade Commission opinion in which the Commission defines materiality in a number of ways, including, among many others, a misrepresentation or practice "likely to affect consumer choice." *Id.*, at *187. Notably, ***not a single Florida court has <u>ever</u> adopted this language in interpreting the FDUTPA.***

4. Therefore, plaintiffs wish to file a one-page Supplement setting forth the holdings of the two cases relied upon by AstraZeneca and making clear that neither those cases nor any other Florida case establish a "likely to affect consumer choice" requirement under Florida law.

While plaintiffs hesitate to burden the Court with additional briefing, because AstraZeneca's representations were so far afield from what Florida law actually holds, plaintiffs believe the record needs to be clarified before this Court rules on AstraZeneca's motion for summary judgment.

WHEREFORE plaintiffs respectfully request leave to file a one-page supplement to their Sur-Reply in Opposition to AstraZeneca's Motion for Summary Judgment Discussing Two Discrete Issues Before the Court, and all other relief that this Court deems just and proper. The proposed Supplement is attached as Exhibit B.

DATED: June 5, 2006

By **/s/ Steve W. Berman**

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on June 5, 2006, I caused copies of **PLAINTIFFS' MOTION FOR LEAVE TO FILE ONE-PAGE SUPPLEMENT TO THEIR SUR-REPLY IN OPPOSITION TO ASTRAZENECA'S MOTION FOR SUMMARY JUDGMENT DISCUSSING TWO DISCRETE ISSUES REQUESTED BY THE COURT** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman

Exhibit A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re:	)	
PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	)	CA No. 01-12257-PBS
	)	MDL No. 1456
	)	

MOTION HEARING
BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
May 23, 2006, 3:05 p.m.

LEE A. MARZILLI
CERTIFIED REALTIME REPORTER
United States District Court
1 Courthouse Way, Room 3205
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P R O C E E D I N G S

THE CLERK: In re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action No. 01-12257, MDL No. 1456, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. SOBOL: Good afternoon, your Honor. Tom Sobol for the MDL plaintiffs.

MR. WEXLER: Ken Wexler, your Honor, for the plaintiffs.

MR. BERMAN: Steve Berman, your Honor.

MR. KODROFF: Jeff Kodroff for the MDL plaintiffs.

MR. MATT: John Matt, your Honor, representing plaintiffs.

MR. HAVILAND: Good afternoon, your Honor. Don Haviland for plaintiffs as well.

MR. MONTGOMERY: John Montgomery, your Honor, for Schering-Plough and Warrick.

MR. EDWARDS: Steve Edwards for BMS.

MR. CAVANAUGH: Bill Cavanaugh for Johnson & Johnson.

MR. SHAU: Andrew Shau, also for Johnson & Johnson.

MR. WISE: Good afternoon, your Honor. Scott Wise for AstraZeneca.

MS. HARRIS: Kim Harris, also for AstraZeneca.

THE COURT: All right, we have a large number of motions here. We have cross-motions for summary judgment as well as company-specific motions. I thought we would deal with the crosscutting motions first and then focus on -- I hate to do this to AstraZeneca -- AstraZeneca, since, as I remember, they are the first trial. Is that right? So at least get through AstraZeneca's and then see where we are.

Do you have another game plan that you all had proposed?

MR. BERMAN: We were going to await your direction. We have no proposal for you.

THE COURT: So I think that I should start -- did you have something else, Mr. Montgomery?

MR. MONTGOMERY: Your Honor, I didn't quite understand what you meant, and I was asking for clarification from my colleagues. But I should ask you. By crosscutting issues, you meant the joint?

THE COURT: Yes, the joint memos --

MR. MONTGOMERY: I understand.

THE COURT: -- which I think everyone joined in on. I don't know that we have time to go through each one of the five defendants. If we can, we can. I know I want to get through AstraZeneca's, since their trial is mid-September. And you have a motion for summary judgment on AstraZeneca as well as on the affirmative defenses. Is that right?

MR. BERMAN: As well as on the -- the partial on the issue of government knowledge and so forth.

THE COURT: All right, so why don't we begin. Are you going to argue for everybody?

MR. MONTGOMERY: I am, your Honor.

THE COURT: Okay, terrific.
MR. MONTGOMERY: Your Honor, you may well have a notion in mind of how you'd like to address this. My thought was to speak for just a bit about what the AWP system actually is; and then, second, about what the government meant when it adopted the AWP system in 1991 and then again continued it by statute in 1997; and then, finally, address the question, if we have any time, as to whether it has been shown that the defendants actually duped the government into maintaining the AWP system for the Medicare program and caused injury.
THE COURT: How long do you think your presentation will be?
MR. MONTGOMERY: Your Honor, I can do this in any amount of time that --
THE COURT: Just we have a lot of issues here.
MR. MONTGOMERY: We do, we do. I'm prepared to just go free form, and I'm sure you have questions and --
THE COURT: Well, why don't we do this. Why don't you begin, and I'm never shy.

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MR. MONTGOMERY: I realize that, your Honor, and I'd be glad to cut this off in fifteen minutes, twenty minutes, whatever is useful.
THE COURT: That sounds good.
MR. MONTGOMERY: Whatever is useful to you.
With respect to the first question of what is the AWP system, we've been at this long enough, your Honor, that I suggest that there's not really very much dispute. AWP is a benchmark price that's reported by pharmaceutical companies to pricing compendia. AWP is a fixed number. There is one AWP for each drug, and the AWP system provides a mechanism in relation to which, or, if you think of it as an umbrella, underneath which there is competition. Competitive forces dictate what the ultimate outcome over time might be with respect to the actual acquisition costs borne by various providers in various classes of trade.
The system, it appears, thinks that it needs an AWP. It has been a hardy and utilitarian device. It's a little bit like the prime meridian. The starting point needs to be somewhere, and you can't have everybody second-guessing where the starting point is. It doesn't have to be in Greenwich, England; it could be in Boston; but you only have one. And then different payors, different providers, use AWP in different ways, depending on their place in the marketplace, their leverage, and different outcomes emerge

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from that use of AWP.
So that's what AWP is. It's a reporting system, and there's a lot of behavior that is organized around that system. It's not a system that was created by the pharmaceutical industry. Quite to the contrary, it was created, it seems, by some interactions between payors and government agencies. That seems to be a little bit lost in the midst of time, I'm not sure it's terribly relevant, but it's a system that has a lot of participants; and actually one of the least active participants are the pharmaceutical manufacturers, though for sure we set that AWP. And AWP has a known, predictable, and disclosed relationship in the branded industry to WAC, the wholesale acquisition cost.
On the generic side of the market, AWP has a known predictable relationship, within a modest range, to the branded AWP at the time that the generic versions of that product are launched into the marketplace.
THE COURT: You know, Mr. Montgomery, as you know, we've both read the same expert reports. I have a sense of

all of this.
MR. MONTGOMERY: Right.
THE COURT: So let's just jump to the fact it was put into a statute.
MR. MONTGOMERY: Yes. Well, it was first put into a regulation in 1991 by HCFA. And so your question, I'm

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sure, is, well, what did HCFA mean? And what HCFA meant, we submit -- and we think the record is perfectly clear and robust on this -- is that HCFA was adopting that system, that commercial system that existed in the marketplace, to utilize it in order to determine, for one particular federal program, how the pricing system would work.
The very agency that made that decision in 1991 had for twenty years or so had experience with AWP, understood exactly what AWP was, and decided to adopt it in 1991 and 1992, after having decided two years earlier that it was not appropriate to adopt a national Medicare fee structure for pharmaceuticals. They didn't want to do that.
Now, the very next year in 1990, they developed a very elaborate program for the Medicaid prescription drug program in the form of the AMP and best price provisions. So the government knew exactly how to go about creating a very precise disclosure mechanism that would disclose exactly what the least average acquisition prices might be. They knew how to do that. But for a number of reasons with respect to the Medicare program, the record in front of you -- and I know we're all looking at the same record -- shows that they decided not to do it.
THE COURT: So it's put into a statute, and I have to construe the statute.
MR. MONTGOMERY: Correct.

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THE COURT: And the statute generally, the way the Supreme Court tells me to do it is look at the plain language of the statute. Okay, so that's where I'm starting from. I have to construe a statute. Now, whether or not there was a mutual misunderstanding or a mutual collaboration to construe it differently may go to the issue of intent to defraud, but why doesn't average wholesale price mean exactly that?
MR. MONTGOMERY: Well, because if you want to approach it from a plain-meaning perspective -- and I actually don't agree that that's where you go. I think this is a specialized term in a specialized field, adopted by a specialized agency, and that you actually treat it as a term of art.
THE COURT: Well, did HCFA define it by regulation?
MR. MONTGOMERY: HCFA did not define it. It adopted it, your Honor. And so what it adopted was the commercial term. So I am quibbling, your Honor, with the path that you take. But let's leave my point aside. Assuming you go through a plain-meaning exercise, I submit to your Honor you're going to come back to exactly the same place: What did HCFA understand?
THE COURT: No. No, no, no. No, no, no. What did Congress understand when they put in "average wholesale price"?

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MR. MONTGOMERY: Well, that didn't happen until 1997. I'm back in 1991.
THE COURT: So you're saying, if I construe the class, as has been requested, as going back to 1991 -- so that's an interesting point -- I should look at what the agency intended and then jump to what Congress intended?
MR. MONTGOMERY: Yes, exactly. Exactly. So I'm

starting with the agency.
THE COURT: All right, fair enough.
MR. MONTGOMERY: But let's still follow the same path. So if you want to go through a plain-meaning exercise, completely divorced from what we know about how this system operates, I would suggest to your Honor that you actually don't have a plain meaning, number one. You have average price. What's average? It could be a mean proportion. It could mean typical. What does wholesale price mean?
THE COURT: Well, "average" has a meaning.
MR. MONTGOMERY: It does have a meaning, but it does mean two things. I don't want to press this point too far, but it --
THE COURT: Because under any definition, you wouldn't need it, right, with AWP? I mean, in other words, let's say I took the most industry-favorable definition of "average wholesale price," the average prices that the wholesalers charge to providers. Let's just say that. And

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let's assume I gave you every break in how you did that. It still wouldn't reflect the drugs here, right?
MR. MONTGOMERY: Well, it certainly would reflect some of the drugs here because it depends on what you think about wholesaler markups. But it's a factual inquiry that you would have to make. But I take your point, that as a result of the operation in the real world of the system, there has been a considerable erosion for many drugs, from average wholesale price to actual acquisition cost, so I take your point. But we're not looking at what actually happened; we're just talking about what the words mean. And I don't want to take up too much of your time fighting about what the word "average" means, but in the dictionary, it's either mathematical or it's typical. And "wholesale," that could either be the manufacturer's price to the wholesaler or the wholesaler's price to the retailer. It's not clear.
But let's assume that you reject that and you say, "No, I think it is exactly clear," you're still, I submit, your Honor, going to have to test that plain meaning against some reality: Does it work? Does it produce an appropriate result consistent with the intent of the statute? Does it produce absurd results? And the meaning of AWP suggested by the plaintiffs can't bear the weight they put upon it because they want, first of all, manufacturers to report that price. Manufacturers don't exactly know, don't have access to

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information about average prices charged by wholesalers to retailers. That's --
THE COURT: Why not?
MR. MONTGOMERY: Well, there's an information gap. We don't ask them. That actually might raise some questions under the antitrust laws. There are a host of questions implicated by the plain meaning. Let me go through them. What period of time does the average wholesale price cover? What geography? What channels of trade?
THE COURT: Well, let's suppose I engaged in all that with you. I mean, right now we have average sales price, we have average manufacturing price. Let me just say this: There's a way of doing it. And let's suppose I engaged with you on that particular issue. That isn't what you want me to do because you claim it's totally untethered from the marketplace.
MR. MONTGOMERY: No, no, no, not at all.
THE COURT: You're saying that they can charge -- for something that the wholesaler would charge a penny for, you can charge $10.
MR. MONTGOMERY: If the marketplace will permit

that, with therapeutic competition, because, remember, for many drugs that you've seen in this case -- I mean, nothing is universally agreed here, but actually at the beginning of a life cycle of a drug, you might actually have a

relationship to WAC. But, again, competition, the tether to the marketplace, erodes that relationship.

THE COURT: Tether to the marketplace, I mean some sort of reflection of acquisition cost.

MR. MONTGOMERY: That's right. And if for the Medicare program the government had wanted a tether to actual acquisition cost, it could have designed it, and it chose not to.

THE COURT: Let me just put it this way: I understand your argument with respect to the period before Congress got involved.

MR. MONTGOMERY: Okay.

THE COURT: But with respect to the time period once Congress got involved, the language is the plain statutory meaning. Now, I understand, what does "average" mean? That's what judges do every day of the week. What does "wholesale" mean? What do "prices" mean? But it has some bearing on acquisition cost.

Now, did the government collaborate somehow with the industry for either good or bad reasons so that they just shut a blind eye to what was happening? That may go to just intent to deceive, but I'm not going to just define it as having no bearing whatsoever on what the average price was charged by wholesalers.

MR. MONTGOMERY: And I understand what you're

saying if you're going to pursue a plain-meaning route, but I submit, your Honor, this is a term of art. It's a system. And it is not -- you're treating it, your Honor, as if it is intended to be a government-created regulatory regime. I want to suggest it's actually the opposite. It's the adoption by the government of a system which was not a regulatory regime. And the government spent the better part of thirteen years debating whether to impose such a regime on the Medicare program. Now that they've imposed it, they're still debating it.

THE COURT: Maybe. I've rejected the political question issue. What I do as a matter of law is construe statutory terms.

Now, I understand your point that it's a term of art. If so, it hasn't been defined by Congress to be that, and there are no legislative hearings that anyone's cited to me to define it as a term of art. I have no basis for construing it other than by what it means. And when they adopted it, it cannot mean what you say it means.

MR. MONTGOMERY: Well, I would recommend, your Honor, that you read -- and there's been some debate about Mr. Scully's testimony before Congress, and the debate has been about testimony in 2003 -- I suggest that you look at Exhibit 63 to the Fowler affidavit, and the Exhibit 63 is another bit of Scully testimony and dialogue in 2001 between

Mr. Scully, who's been with this since the '80s, and the Congressional committee.

THE COURT: And what's his other statement, the one that the plaintiffs are emphasizing? What exhibit number?

MR. MONTGOMERY: It's Exhibit B to Mr. Berman's affidavit.

THE COURT: All right, so that's the point/counterpoint you want me to look at?

MR. MONTGOMERY: Well, actually, I think you can

look at both of them.
THE COURT: Okay.
MR. MONTGOMERY: But I think what you'll find is that Mr. Scully, at least the committee that he was testifying before, that they understood exactly what had happened. What you see --
THE COURT: Are there any legislative reports, any conference committee reports, anything I should look at?
MR. MONTGOMERY: Yes. There's a 2003 House report on the Medicare Modernization Act.
THE COURT: At the time that AWP was put in.
MR. MONTGOMERY: I'll have to submit something to you identifying. We did cite to your Honor and I think provide in the record, but I don't have the exact cite to the back-and-forth in 1997.
Remember, in 1997, the proposal that Congress was

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considering was to adopt an actual acquisition cost system. They rejected it, and they went to 95 percent of AWP. And in 2000, the administration proposed creating what it called a "real AWP," and Congress put a moratorium on any adjustments to the AWP system. So even if you follow this plain-meaning exercise for 1997, what do you do about 2000?
THE COURT: So you want me to just freeze 2000 out of the class?
MR. MONTGOMERY: Well, I think you need to look at 2000. Congress said, "No, HCFA, you may not change the external AWP system that's embodied in the statute."
THE COURT: Okay. All right, so let's assume for a minute that you don't win that point and we move on to plain language. We have a statutory scheme here where 80 percent get paid off by the government and 20 percent as a copay by the beneficiary. And so you've tried, as I've read the case law, to paint the government as an intermediary, just the way like a car dealer would be to a consumer.
MR. MONTGOMERY: Correct.
THE COURT: But, actually, the way the statute is set up is a little different because the doctor bills the patient.
MR. MONTGOMERY: Yes, but the price of admission is defined by the government. In other words --
THE COURT: By statute.

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MR. MONTGOMERY: By statute and by regulation.
THE COURT: Right, the 20 percent of AWP. It's not like a --
MR. MONTGOMERY: Well, it's 20 percent of the entire cost, which includes as a component AWP.
THE COURT: Fair enough.
MR. MONTGOMERY: And includes, of course, the service or dispensing cost, so we get to the cross-subsidy point and the question of whether there's a causal connection to any real injury here, because even if we lose on every point with your Honor on AWP, they still have to prove some injury. And what was going on during this policy and political discussion for the better part of thirteen years was a debate whether we were going to focus on drug cost or total cost. And what the Medicare Modernization Act is, it's an express embodiment of a compromise that said: We're going to look at the total cost. We've already got the concept in the statute, and that we're going to have to address both elements. And the failure to address administration costs is what clearly, plainly prevented -- well, "prevent" is the wrong word -- but led Congress not to adopt the acquisition cost proposals that HCFA was presenting to them because they didn't think that it was going to address issues of access

for this vulnerable population. They weren't convinced of that. And until HCFA was going to step up to the plate and address total cost rather than just focusing on drug cost, there wasn't going to be any progress. And if you look at the legislative reports that I've referred to you -- and I have another cite, Exhibit 42, which will take you back to 1997, I believe.

THE COURT: Exhibit 42, and what's that? That's useful.

MR. MONTGOMERY: It should be the Fowler affidavit. It's a Congressional report that talks about -- it's one of the reports that we cite, your Honor, that talks about spreads and the extent of spreads. This is a Congressional committee report that acknowledges there are spreads between --

THE COURT: At the time that the AWP was put into the statute?

MR. MONTGOMERY: I believe so, yes. Yes, 500 to 1,000 percent in 1997, acknowledged by a Congressional committee in connection with its consideration of the adoption of 95 percent of AWP; again, the adoption of what we believe to be plainly --

THE COURT: So that was like a House report or something?

MR. MONTGOMERY: A house report -- an external system.

THE COURT: You know, I actually used to work in Congress. There was no term, you know, a section-by-section analysis that defines AWP anywhere?

MR. MONTGOMERY: There is no definition of AWP, and that's because, I think -- I think the explanation is, is because they were adopting something that was external. And so if you look at the reports that we all debate back and forth and you look at them from a different perspective, they reflect an understanding that Congress was adopting something that it hadn't created. It was in effect inheriting a system, and, you know, for better or for worse. And, frankly, because it was a system that operated as an umbrella over just a competitive mechanism, something we love to do in our system -- you know, marry competitive systems with, you know, quasi-regulatory systems -- it was pretty lumpy. It produced lots of results that attracted a lot of attention and observations from government officials.

THE COURT: You make a huge separate point on causation in your briefs, and we don't have that much time. So you try and cast the government as the intermediary that stops the causation chain.

MR. MONTGOMERY: Yes.

THE COURT: That somehow is lessening it.

MR. MONTGOMERY: Yes. Well, there can be deception. I mean, if there was no deception by the decision-maker, there can't be any loss. The decision-maker is the government.

THE COURT: This is what I wanted to talk about. In a sense, they're not the decision-maker because if I say the statute means X, they're not the decision-maker because it's not as if they set the rate. In other words, it's not like FERC, the Federal Energy Regulatory Commission, or some of the other regulatory agencies that sets a rate. They basically just pay off 80 percent of what the pharmaceutical company says is the AWP, and they tell the doctor to bill the Medicare beneficiary for the other 20 percent. So it's not intermediary in the sense of the cases you've cited.

MR. MONTGOMERY: Well, except it's the same kind of decision-making. The government could have come to the same result by using a fee schedule and a regulatory system which it would impose.
THE COURT: But they didn't, so they relied on the integrity of the price report.
MR. MONTGOMERY: That's right, but there's no difference. You've got to show that it made some difference to the purchaser, and it didn't make any difference. The purchaser wasn't going to get to play unless they paid the 20 percent. That was the government's decision.
THE COURT: Of AWP?
MR. MONTGOMERY: Of AWP.
THE COURT: So it wasn't really -- the government

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isn't really an intermediary, by which I mean, CMS doesn't act as an intermediary.
MR. MONTGOMERY: Not in that sense, but they're the organizer of the event. You don't get a ticket to the theater --
THE COURT: Unless you pay 20 percent of the average wholesale price.
MR. MONTGOMERY: -- unless you pay 20 percent of whatever is being charged. And in this system, it's under the AWP system, which, as I said, is constrained by competition, but that's the entry mechanism. And then we get to the second element of causation, and that's the question of total cost, which the plaintiffs don't address at all. Dr. Hartman says, "I'm not looking at cross-subsidization. I'm not looking at the legislative consideration of this question of total cost. It's not something that I've taken into account at all."
So even if you get all -- I'm repeating myself, but even if you get all the way through the analysis -- you know, is there any harm to a particular individual in that payment of 20 percent? -- I'm going to show you, if we get to the Warrick portion of the argument, what happened to total expenditures on a particular drug, and they went up under the Medicare Modernization Act.
THE COURT: But I have to follow the statutory

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scheme which has been set up; and while you may be right that under the radar screen, the reason why Congress didn't have the desire or they couldn't get a consensus to change it is because they didn't want to overhaul the whole thing, I don't think that that's legally relevant. I have to follow the statutory scheme that we've got.
MR. MONTGOMERY: Well, except the statutory scheme that we've got intended to confer a benefit on these consumers at a price. And I do think that if you ever get to the subject of damages, you've got to look at whether there was any damage. The damage comes in the form of the 20 percent. The 20 percent is not -- I mean, there are component parts to it, but the consumer just writes out 20 percent. It's an all-in number.
THE COURT: Right. So are there any other big -- those are the two big issues I focused on, what does AWP mean, and what is causation in this regime?
MR. MONTGOMERY: I think those are the big issues. And, you know, I think what's going on here is that Congress did fail to act. This case is requiring or asking you to impose a retroactive regulatory regime that requires a lot of detail of the sort that I was mentioning earlier. You know, you'd have to create that regime in order to actually fashion this mechanism. And it's really absurd, your Honor, when Congress chose not to do it. And, remember, --

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THE COURT: Well Congress' failure to act is different than a conscious decision as to what AWP meant after the fact. I mean, you can't look at a 2003 report on what it evolved into and say that's what they meant in 1997.

MR. MONTGOMERY: That's why you should read Mr. Scully because Mr. Scully gives you a historical perspective.

THE COURT: I will do that.

MR. MONTGOMERY: And remember, of course, the pharmaceutical companies didn't get the money. And what the plaintiffs say is, "Oh, contrare. You got market share."

This is summary judgment. This is time for them to come forth with some proof. There is nothing in their papers about market share, no correlations that they attempt to analyze or draw to market share. It's a construct, your Honor, and it's a house of cards. And at summary judgment stage, they shouldn't be allowed to continue on such a basis.

THE COURT: All right, thank you. Plaintiffs?

MR. BERMAN: Thank you, your Honor.

THE COURT: So what does AWP mean?

MR. BERMAN: It means the plain meaning that you would give it in Black's Law Dictionary, an average price.

THE COURT: And you're not pushing for the statutory construction, which is confusing from your briefs, for me to adopt this, "Well, the market understood

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30 percent" thing, Dr. Hartman?

MR. BERMAN: Well, there's two issues. Let me get to Dr. Hartman. We believe that if you follow the plain meaning rule that you've been talking about -- and we've cited the cases -- this is not one of the exceptions for a technical term or art term to be employed -- that it can only have one meaning, and that is, it was supposed to be the national wholesale average. And if you look at --

THE COURT: For what year? That's Mr. Montgomery's question. Well, how do I decide what that means?

MR. BERMAN: Okay, you mean timewise?

THE COURT: Yes.

MR. BERMAN: If you look at -- I have a notebook that I gave your Honor, and I have a chart. And what I think the chart will show you is that prior to the adoption of the regulation in 1997, and in the first entry, for example, Congress was basing reimbursement on actual acquisition cost.

THE COURT: Which tab?

MR. BERMAN: It's called History of AWP Reimbursement. I believe it's Tab 3.

THE COURT: Tab?

MR. BERMAN: Three. It should be blue.

THE COURT: All right.

MR. BERMAN: What you see in at least the first four or five entries is that every time Congress defined what

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it was trying to do, it said, "We're trying to gear our payments to acquisition costs." And acquisition costs, we believe, if you look at Item 2, for example, is, quote, "very similar to the Average Wholesale Price." And then in Item 3, "Medicare policy. . . has been to base payment for 'incident to' drugs on the estimated acquisition costs." Then Item 4, "Estimated acquisition costs," according to HCFA is, "or the national average wholesale price."

So if you look at Congress' intent prior to '97, they were looking for estimated acquisition costs. They thought that it was the same thing as average wholesale price, and they eventually adopted average wholesale price. So from the get-go, the reason they adopted it was, they were

finding it was difficult because of the lack of transparency in defendants' records to find out what the real price was, so they said, "Okay, we have to use the national average wholesale price."

We have moved for summary judgment because I think you hit the nail on the head when you said they aren't contending, and they never have, that they meet this definition. They don't. There's not one shred of evidence -- and we've put in evidence to the contrary -- that the reported AWPs were the national average wholesale price. They weren't. That's not a contested fact.

THE COURT: What are you looking for summary judgment on?

MR. BERMAN: I'm looking for summary judgment on the following things: First, that each defendant either directly published or caused to be published the AWP. Only one defendant really contests that, that's BMS; and they published the wholesale list price, which they knew would be turned into AWP, and they knew the wholesale list price was a phoney price. The rest of them don't contest that.

Second, we want your Honor to rule as a matter of summary judgment that the average wholesale price is defined the way we interpret it in our briefs. And I think you have to do that --

THE COURT: Without regard to Hartman?

MR. BERMAN: Without regard to Hartman. I think we have to do that because that's not for the jury to decide.

THE COURT: All right, so you want me to define it as a matter of law?

MR. BERMAN: Yes.

THE COURT: All right, what's the third thing?

MR. BERMAN: The third thing is that there is no contested issue of fact that -- and maybe I've said this, your Honor -- I apologize if I'm repeating myself -- that the defendants did not -- that they caused false or deceptive AWPs to be published, because, again, they're not contesting that --

THE COURT: So you want me to just basically give you summary judgment? I mean, you basically want the whole case to go away?

MR. BERMAN: Except for one thing.

THE COURT: What?

MR. BERMAN: I think there's only one issue left.

THE COURT: What?

MR. BERMAN: Damages. What is the damage? I mean, obviously there's an expert dispute on --

THE COURT: Unfair and deceptive, is that a jury call?

MR. BERMAN: Well, I don't think the jury gets it because I think you decide that, whether it's unfair and deceptive.

THE COURT: Under all state statutes?

MR. BERMAN: It's a mix on that.

THE COURT: Well, then I can't do it. All right, so unfair and deceptive remains a jury call.

MR. BERMAN: But there could be a finding --

THE COURT: And there may be some states in which it's not, but unfair and deceptive does not come to me.

MR. BERMAN: But there could be a finding, your Honor, and I think there should be, that as a matter of fact --

THE COURT: I will not do that on summary judgment. All right, I do think it's appropriate for me, and

I think both sides are urging me to do that, to define AWP as a matter of law. And both sides, one wants it as a term of art which reflects just what the report says; one says I should do it sort of based on plain language. That is for me. That I will do. I'll ask you about the cost to be published, whether that's disputed or not, in a second.
And some, like Massachusetts, that's a judge call, right?
MR. BERMAN: That's correct.
THE COURT: You're saying you've looked at all the remaining states that are left, and some of those are jury?
MR. BERMAN: I believe so, your Honor.
THE COURT: And you're going to at some point give me that compendium.
MR. BERMAN: Yes. But as to Class 2, which is Massachusetts only, we believe that based on the record we've given you, that you can enter a summary judgment on all issues but damages.
THE COURT: Okay, and what's the next one?
MR. BERMAN: That's it on summary judgment in our favor, and obviously --
THE COURT: You've also asked essentially on statute of limitations all the affirmative defenses go out, right?

MR. BERMAN: Yes, and if you wanted us to address that, Mr. Haviland will address that.
THE COURT: All right, so we'll get to that in a minute. So can you help me out? Did you find any legislative reports back in -- when was it? -- 1997 that put into effect this AWP, what it means, what Congress meant?
MR. BERMAN: Other than these excerpts we've given you, when Congress seemed to relate AWP to estimated acquisition cost, the answer is "no."
THE COURT: All right.
MR. BERMAN: But to get to a couple of points that Mr. Montgomery made, he said, you know, take a look at Mr. Scully. I think he referenced the fact that Mr. Scully testified that AWP -- and this is Point 15 in my chart -- "is intended to represent the average price at which the wholesalers sell drugs to their customers, which includes physicians and pharmacists." And Mr. Montgomery was very silent about the fact that you look to agency's interpretation of its own mandate. And the office of the Inspector General and CMS have both said it's supposed to be average wholesale price, and the OIG has said it's supposed to include all the types of discounts, rebates, free goods that we claim are not reflected in the published price. So not only are they not entitled to summary judgment, but we believe, going back to where I was, that there's not much

left to try, particularly with respect to Class 2.
THE COURT: Have you done a compilation of the statutes in which actual reliance is required?
MR. BERMAN: We did that for you in our class certification papers.
THE COURT: So on those reliance statutes, do I carve those out?
MR. BERMAN: Well, we're proceeding on the theory -- remember how we unified this class -- that this was an intentional fraud, and therefore we sweep in everyone.
THE COURT: Regardless of reliance?
MR. BERMAN: That's correct. And in this case --
THE COURT: I'm thinking that may be you're mixing apples and oranges.
MR. BERMAN: I am mixing up apples and oranges. We

did not break out the reliance issue for you. You know, we could do that for you at a later date, but in most states, when you have an omission of fact, you get a presumption of reliance. And in this state, reliance is not required.

THE COURT: This state, under 93A, reliance is not required.

MR. BERMAN: That's right.

THE COURT: That having been said, in most fraud cases, you have to prove that someone would have relied on the material fact omitted, so I think we need some analysis

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there. But, anyway, so you've given me -- I think everyone agrees I need to decide AWP as a matter of law. I think I'm unlikely to find that it's unfair and deceptive in cases that require jury trials. Otherwise I'll hear a trial benchwise if I get that far. Now, the argument --

MR. BERMAN: Can I go back --

THE COURT: Yes, is there anything else you wanted to say?

MR. BERMAN: Yes. I want to go back to one cite, and Mr. Montgomery, I think, said you should look at their Exhibit 82 as the definitive exhibit. If you look at that, it's a House Ways and Means report --

THE COURT: I don't have that down. I have 63 and 42, right? You have 82?

MR. BERMAN: An additional one is 82. It's in my chart.

THE COURT: And what is that?

MR. BERMAN: It says -- this is a House Committee on Ways and Means -- "AWP is intended to represent the average price used by wholesalers to sell drugs to their customers."

THE COURT: In what year?

MR. BERMAN: That's in 2003.

THE COURT: Is there any other point that you want to make?

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MR. BERMAN: Well, I want to make the one point very briefly, your Honor. And I have a chart in the book, and it goes to why we're asking for summary judgment. This is a chart that shows the average wholesale price for Zolodex. Zolodex is the AstraZeneca drug.

THE COURT: Well, can we wait until we get Zolodex up at bat?

MR. BERMAN: All right, that's it for our affirmative motion except for the affirmative defenses.

THE COURT: Let me ask you this, Mr. Montgomery. I don't know if you're prepared to answer for everyone. Is it undisputed that the drug companies caused the AWP to be published?

MR. MONTGOMERY: Caused. . .

THE COURT: In the publishing book?

MR. MONTGOMERY: There may be a phrasing problem. I think it's probably undisputed that we participate --

THE COURT: That you either reported AWPs or you gave a WAC and understood the percentage by which they would be marked up?

MR. MONTGOMERY: I don't think that I could concede that. I mean, there are a number of stories that I think that you've seen at various points in these cases where one company or another actually didn't cooperate in the AWP system, and a price was reported anyway.

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THE COURT: Fair enough. I'm talking about the five, or should I go through them one by one?

MR. MONTGOMERY: Well, certainly as to certain

drugs, we, I believe -- I'm looking at my colleagues here -- all participated in the system in one fashion or another.

THE COURT: Is there anybody from the first five that would contest that you substantially caused the AWP to be published, either by reporting AWPs or WACs, or some variation, understanding the formula that was going to be used?

MR. EDWARDS: Your Honor, for BMS, BMS reported a list price. The record is extensive that BMS did not control the markup factor that the publications used to create the AWP.

THE COURT: So for you, it would be a fact question.

MR. EDWARDS: Excuse me?

THE COURT: Well, let me ask you this: When you say not controlled, you would report the list price to which publishing house, was it?

MR. EDWARDS: All three of them, your Honor.

THE COURT: All three of them. Did you understand the markup that was going to be used?

MR. EDWARDS: Yes, your Honor, but we didn't control it. It was their decision what to do.

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THE COURT: So then the issue really is, I guess, what legal effect that had if you knew it was going to happen but you didn't control it. Is that --

MR. EDWARDS: That's correct, your Honor, and we've cited to you the evidence of the lack of control, and we've cited to you a number of cases which demonstrate that control is necessary, including the entanglement cases. These are cases that arise under the securities laws.

THE COURT: Okay, so I need to focus on you.

MR. EDWARDS: Yes.

THE COURT: That would be the one fact? You know, I'm highly unlikely to rule on individual motions for summary judgment until it's time for trial, which is why I would like to focus right now on AstraZeneca, which, as I understand it, is still the first trial. Is that right.

MR. BERMAN: That's correct, your Honor.

MR. CAVANAUGH: Your Honor, Bill Cavanaugh on behalf of Johnson & Johnson. With respect to causing AWPs, we would report them to the pricing services. The pricing services ultimately determined what they were going to do, and let me give your Honor an example. As your Honor knows from the case in front of you, First DataBank, for our two drugs, on Remicaid, we reported an AWP that was 130 percent of the reported WAC, a 30 percent spread. First DataBank unilaterally took it down to 25 percent. On Procrit, we

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reported a 20 percent spread, and First DataBank took it up to 25 percent.

So, your Honor, the plaintiffs have been quite cute in using the term "caused." Manufacturers didn't cause those to be published because there was an intermediary -- i.e., the pricing service -- which apparently ultimately determined what number would be published.

THE COURT: And I remember when this first came in, everybody sort of, you all, for purposes of RICO said, "Well, they couldn't have been a part of the enterprise because there's no common purpose. We just told them what to do, and they did it." So --

MR. CAVANAUGH: Well, your Honor, the facts as to First DataBank and those actions in 2004 are basically undisputed that that's what they did in 2004.

THE COURT: I just feel as if it's shifted a little, but maybe that's true for everybody. I just remember

the argument being there couldn't be an enterprise because there's no common purpose because the publishing companies just were like the phone book; they just published what we told them to. And maybe you all weren't involved at that point, but, in any event, let's get to AstraZeneca.

All right, you have some unique defenses, and one of them had to do with one pill or one -- what was it called now? There was one of them where it was an agreed-upon

judgment that it was unproven.

MR. WISE: Oh, yes, your Honor, I think I know what you're talking about.

THE COURT: You know, I had never heard of it before. It's mostly for children, a kind of inhalant?

MR. WISE: Thank you, your Honor. Scott Wise for AstraZeneca.

THE COURT: So from right off the bat, everyone agrees we throw that out, right? What was the name of it?

MR. WISE: Pulmicort Respules. You're absolutely right, everybody has agreed you don't have to worry about that.

THE COURT: Okay. So now we go to the weeds of the Oregon and Florida statutes.

MR. WISE: For two seconds, though, could I just make one plug, and it will only take 15 seconds, on the statutory interpretation point? I commend to you our brief, it's a plug for our brief, AstraZeneca's individual memorandum in opposition to plaintiff's motion for partial summary judgment. It's a ten-page section on the rules of statutory construction and how we think you should go about determining the meaning of the phrase in the statute "average wholesale price." It goes through plain meaning, term of art, et cetera, very cogent, and I think it answers the question and gets to the result that it's a term of art, that

Congress adopted a term of art in use as --

THE COURT: Thank you, because I will be reading in depth your briefs.

MR. WISE: And there's a footnote with a line of cases going back to the 19th century about terms of art and how they're used in statutory interpretation. I promise it's really, really good.

MR. BERMAN: It's riveting.

(Laughter.)

MR. WISE: It's the kind of thing that only lawyers could get excited about.

Now, okay, so no Pulmicort. And, finally, after some period of time, we're getting this boiled down to something you can get your arms around, one product, Zolodex.

THE COURT: Right.

MR. WISE: Two plaintiffs in the consumer class.

THE COURT: Right.

MR. WISE: One from Florida, one from Oregon.

Now, you remember, or at least certainly I remember at least one, maybe more occasions where you have exhibited some frustration in all the paper flying around your chambers never adequately coming to grips with the core state law problems in this case. You now have a putative class involving all sorts of different state laws, the prospect of a multiweek, multimillion-dollar trial of a class action

based on these components of state law. So we tried to take a little different tack here and tried to get at Florida and Oregon law with respect to Mr. Howe, who is a prostate cancer patient from Oregon, and Mr. Townsend, who is a similar patient in Florida.

And it's not that complicated, but we think it's pretty clear, when you look at the statutes and you compare them to the facts that are really undisputed with respect to these individual class representatives, there is really no viable claim that should be permitted to go forward here under these particular state schemes.

The first one, Oregon. Oregon, it's not totally unique, but it's unlike many of the other state statutes. It specifically proscribes 56 different business practices, and then it says: You have a claim, a private action, if as a result of willful use and employment of an act or practice declared unlawful by this chapter. Okay, so they have a system, they have 56 different categories; and you have a claim if you're complaining about something that is described in one of those categories.

This, however one describes this AWP case, does not fit in any of the 56. It simply does not fit.

And there is a catchall section in the Oregon statute, by the way, which the plaintiffs may point to, but there is a catchall of the catchall, which is, the catchall

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doesn't have any meaning unless the AG in that state conducts a rule-making to establish under the catchall provision that a different kind of practice needs to be prescribed. So the catchall has no affirmative meaning unless that rule-making takes place; and there has been, at least as of this morning, I can report, no AG rule-making in Oregon with respect to AWP pricing.

THE COURT: Or pricing.

MR. WISE: Right, or pharmaceutical pricing.

THE COURT: Is there anything in general about pricing? Does it have to be --

MR. WISE: All sorts of stuff about pricing; you know, whether you represent you have certain ingredients in your product, or that it's real estate, or it's directed to consumer advertising, claims that your products are more effective than the other guy's products, all that kind of stuff. None of that -- you know, have your clerks look through your -- we don't think any of the 56 remotely describes, you know, a pricing dispute with respect to how the federal government set up a medical reimbursement program.

Okay, that's Oregon. Let me just mention while I'm up here --

THE COURT: Well, suppose I agreed with you, because I read the footnote where the statute was set forth,

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now, you would then say that knocks out that particular plaintiff altogether as a class representative? Is that it? That's what that accomplishes, right?

MR. WISE: I understand the question, but the only claims before you in this case at the moment are the claims being litigated by the class representatives. They're the only claims we have to address.

THE COURT: Well, no, you've got the whole class.

MR. WISE: We have a whole class, but the theory of a class action is that the claims of all the class members can be adjudicated through the prosecution of a representative claim. We're not trying a bunch of different claims at the same time.

THE COURT: I read the section, and I said, "Oh, I know where Wise is coming from on this," right? I mean --

MR. WISE: They're the only claim we can address. They're the only person that's came forward with a claim against us, these two people.

THE COURT: But suppose I agree with you. Under

class action law, I've got a whole class now, I've certified the class.
MR. WISE: There's no rep for the class perhaps.
THE COURT: So the question that I run into is -- the class certification papers were huge, okay? I don't remember this being raised as something that didn't make this

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gentleman, whose name I forget, atypical.
MR. WISE: Mr. Howe.
THE COURT: Yes. So is it now under class action law too late for you to raise it?
MR. WISE: No. It's not a question of typicality, I mean, although you'll recall these plaintiffs were being added sort of the night before or the morning of the various class certification proceedings. I can't remember when Mr. Howe joined --
THE COURT: Right, they're old sick people, and some of them were dying.
MR. WISE: He's been here for a while. But, no, this is the first time we've ever had the opportunity to address his claim on the merits of his claim under his state law. We've never had that opportunity before.
THE COURT: But suppose I'm agreeing with you. This is --
MR. WISE: Then you would have to decide, I guess, whether to permit some effort to find, if needed, another class rep. But the only claim before you now is this person's claim; and if he has no claim, you know, or if the two of them together have no claim, there is no class representative for this class with respect to AstraZeneca.
THE COURT: So then the natural result is, I can't dismiss the class, I just certified it. I give them a chance

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to run out and get someone else. That's the concern I have. It wasn't that you were raising something frivolous. I mean, I saw what you were talking about.
MR. WISE: Well, the real question from your point of view, it seems to me, one of the real questions -- there's probably more than one -- is whether one wants to build a nationwide class action trial on the strength of this particular class rep claim.
THE COURT: All right, so --
MR. WISE: And if there isn't any merit to the claim and it's dismissible on summary judgment, I think the answer should be "no." Now, how much time you give them or where they go look for other potential class reps is a subsidiary question.
THE COURT: And the Florida suit, that was a broader statute.
MR. WISE: A little bit broader but interesting, not -- different in structure but --
THE COURT: That's more like ours that's here in Massachusetts.
MR. WISE: A little, but the case law -- let me make a couple points -- makes it clear that in terms of legislative history, sort of pronouncements of the Florida courts, the law is directed to consumer transactions. It requires deception and materiality, the Florida Supreme

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Court; and it gets at practices, quote, "likely to affect consumer choices."
THE COURT: But aren't these patients consumers?
MR. WISE: They are, but nothing we did was likely to affect their choice. In fact we had no communications with them at all.
THE COURT: So you're saying, because the drugs

were mandatory, in the sense that they're going to die if they don't take them, that there was no choice?
MR. WISE: There was no conduct that AstraZeneca entered into or performed that was designed to affect patient choice, consumer choice.
THE COURT: All right, so --
MR. WISE: And if you look at the cases, Page 14 and 15 of our brief in support of our motion for summary judgment --
THE COURT: Because you're saying consumers really doesn't have a choice here; they do whatever the doctors say?
MR. WISE: Yes. All of this conduct that's related to pricing and dealing with the government and CMS, none of it is directed at plaintiffs. This is not advertising that says, "Take our product because our average wholesale price is a great price" or anything. It's not consumer-directed conduct. Now --
THE COURT: No, it's doctor-directed. So you would

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say that you can't call them the consumers? Is that the legal argument?
MR. WISE: Yes, I think so. I think there's a good argument, if you think about it, that a doctor-patient relationship probably doesn't even come within the concept of the consumer protection law of Florida. That is, what goes on between doctor and patient I don't think probably is a consumer transaction.
THE COURT: So your point under Florida law is, there's nothing here that could have affected consumer choice?
MR. WISE: Correct, "likely to affect consumer choice."
THE COURT: And that comes out of the statute?
MR. WISE: Yes, and a case called Millennium and another case called PNR in the Florida courts, Page 14 and 15 of our brief.
The only authority they come back with against our arguments that their statute requires deception and materiality, something that really means something to a consumer, that influences their behavior, is a case from the FTC involving Doan's pills. Remember those pills, the ancient pills? Well, the case of the FTC --
THE COURT: I'm not that ancient.
MR. WISE: Claims about what the pill did; you

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know, "It fixed my back better than the other guy's pills did," a false advertising case. It's not a relevant case. It has nothing to do with construing what's required under the Florida statute.
THE COURT: So you're saying that the Florida statute is a lot broader than Oregon, but it's not quite as broad as Massachusetts because it has in it a requirement that it affect consumer choice?
MR. WISE: Yes.
THE COURT: Okay, thank you. So who's in charge of Oregon?
MR. WEXLER: I am. Even though I'm from Illinois, I guess I'm close enough. Ken Wexler, your Honor.
I want to address this last point first and direct your attention to the case Latman V. Costa Cruise Lines.
THE COURT: You know, you're going to have to speak up so that both the Court Reporter and -- you know what, if you went up to that podium, all of the other people could hear you. Just pull down the mike and --
MR. WEXLER: Thank you, your Honor. The case of Latman V. Costa Cruise Lines, 758 Southern 2nd 699, Florida

District Court of appeals, the decision was in 2000. And that case involved a cruise line that was extracting an excessive tax. They were paying some to the government and pocketing the rest. And the court there recognized the need,

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number one, to liberally interpret the consumer fraud statute of Florida.

THE COURT: Is that the Florida Supreme Court?

MR. WEXLER: No. It's an appellate court, the Florida District Court of Appeals.

THE COURT: I should have learned that all through the elections, but what is that? That's like a --

MR. WEXLER: It sounds like an intermediate court to me. But it said, "In the case of an overcharge," which is what this case is about, people overpaying because of the inflated AWP, "In the case of an overcharge, though people actually paid, we would not hesitate to say that an intentional overcharge of sales tax, which is kept by the company itself, is an unfair and deceptive trade practice, and that the consumer must be repaid. That is so even though the consumers were clearly willing to pay the price charged," which Mr. Townsend was because he was dying of cancer. He was clearly willing to pay the price charged. It says, "Nor would it make any difference that consumers paid no attention to the sales tax amount," meaning the actual amount that he had to pay.

So, you know, it's a nice construct to say that it's between the doctor and the patient, and because there's no choice, there's no liability for a fraudulent price; but the Florida statute says simply that there has to be a --

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THE COURT: So do I just read it out of the statute?

MR. WEXLER: It's a likelihood of deception. There's no --

THE COURT: Does the statute say "likely to --"

MR. WEXLER: "Likely to deceive."

THE COURT: It doesn't say "affect consumer choice"?

MR. WEXLER: I'm not familiar with that language. It may have come from a case. But the statute itself says "likely to deceive."

THE COURT: I see. Okay, thank you. Now let's get into Oregon, because I was trying to shoehorn it into one of those little statutory sections.

MR. WEXLER: It's quite easy.

THE COURT: Okay, go.

MR. WEXLER: Section 646.608, 1(s), I can't believe that we don't fall under this because it --

THE COURT: Could you read it.

MR. WEXLER: Yes. I'll read it verbatim. It says, "A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following," and (s) says, "Makes false or misleading representations of fact concerning the offer and price of. . ."

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THE COURT: Well, at first I thought that, the offering price, ah-ha, that's it. But they cited some cases that seemed to suggest that those were discounts. In other words, I think it was the reply memo, and I batted it back and forth. Did you look at the cases they cite that say that that refers to misrepresentations about discounts?

MR. WEXLER: Yes, and we don't think that's an appropriate interpretation of those cases. I mean, the language is very straightforward.

THE COURT: Did the cases not say that? I mean, I --
MR. WEXLER: I'm not sure. I can't tell you right now. I don't recall standing right here, but we read the cases and did not feel they were applicable at all.
THE COURT: Right, so this is really helpful. You're really narrowing yourself down to -- because this was actually not briefed as well as some of the mega points because -- I mean, not just you. I mean back and forth. We're really getting pretty refined here.
MR. WEXLER: There is also Section (j) which refers to "Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions." Now, that may on its face not sound applicable, but AstraZeneca has run around throughout this entire case saying that "We had the lower AWP compared to Lupron. We

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were the lower-cost alternative," okay? It's an AWP -- they will argue at trial it's a fact question. I mean, they will argue at trial that "We were the lower-cost alternative, and therefore we shouldn't be --"
THE COURT: But that's not price reduction; that's competition. Let me just say this: Do you want a chance to look at his case? You didn't file a surreply on this, right?
MR. WEXLER: We did not file a surreply. I would like the opportunity.
THE COURT: It's actually a blessing, but on this particular point, if you could -- I don't know if Mr. Wise remembers those cases, but his firm -- the offering price is the one that hit me, and then he cites several cases which suggest that those have to do with misrepresentations about how a discount was derived. And that may be as we just keep shaving off the issues --
MR. WEXLER: Well, then I'm happy to supply a surreply, and tell me when.
THE COURT: Like two or three pages by Friday --
MR. WEXLER: Fine.
THE COURT: -- on whether or not you agree that that's what the cases say, and if not, whether there's some other cases that describe what "offering price" means.
MR. WEXLER: I will tell you right now, I do not agree that's what those cases say or --

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THE COURT: I'm sure you don't.
MR. WEXLER: -- and we will confine our case --
THE COURT: Well, it just may be that there's a split in the lower courts or that sort of thing.
Am I correct in asking that, Mr. Wise?
MR. WISE: Yes. The one other thing I would mention, your Honor -- and I don't mean to interrupt too much, but I will just briefly -- there is an elaborate set of regulations which we also cite put out by the Oregon Attorney General elaborating on Subsection (s), and that elaboration makes it totally clear that what (s) is addressing is advertised discounts.
THE COURT: Okay.
MR. WISE: And it's quite an elaborate thing, and you can --
THE COURT: It's just something, rather than having my clerk, with all the things I have to do, start from the get-go on Florida law, it would be very helpful if within a week you gave us your version of what, since you say that's the one that clearly applies.
Now, let's suppose we disagree with you, okay. Now, I'm trying to understand as a practical matter what that means. So as a class, I would carve off Oregon. I'd have to

decide whether the Florida law captured it. And if I decided that it didn't capture it, I carve off two states, and you have to go back and find your class representatives. Is that the practical effect of all of this?

MR. WEXLER: Well, I wouldn't say that you would carve off Oregon yet, but, yes, if you granted summary judgments on the claims of these individual class members, yes, we would like the opportunity to find substitute class members.

THE COURT: What would you say -- and maybe it's unfair to turn to you, since you have a whole team here -- would be the broadest state consumer protection statute?

MR. BERMAN: Massachusetts, your Honor.

THE COURT: More than California?

MR. SOBOL: Yes.

MR. BERMAN: We may disagree, since I'm on the West Coast, but they're pretty close. I'd have to analyze it, but they're almost identical.

THE COURT: All right, because what I'm going to have to do, which I'm dreading but I will have to do, is, if this goes forward to trial in September, I need to find out what the -- apart from whether individual class representatives exist, I'm going to have to find out what are the common questions that I'm going to give to a jury. I mean, it is time now to put your teams of summer law clerks on figuring out what states are left. And the reliance question, if we get there, I mean, in other words, actual reliance is not going to happen with any of these, with these classes. That's not part of this case, if there's a requirement of actual reliance like in some of those advertising cases. So we need to figure out from the get-go which cases to just carve off. Some don't, I know that. Massachusetts is one of them. It looks as if Florida is not one of them. On the other hand, I have to deal with the consumer choice issue. And in Oregon, I have to just figure out even whether this is an offering price case.

MR. BERMAN: And on the class representative issue, your Honor, we already have another representative. If we needed one, we could --

THE COURT: On Zolodex?

MR. BERMAN: On Zolodex.

THE COURT: Is that already in the case?

MR. BERMAN: It's not in the case yet.

THE COURT: What state?

MR. BERMAN: Texas.

THE COURT: How broad is that statute? In other words, we can't keep -- I mean --

MR. BERMAN: I understand that.

THE COURT: I mean, this is September, September.

MR. BERMAN: And I suspect -- we're about to give you the class notice which comes out very shortly in order to have the trial date hold, and I suspect in reaction to that notice we will have quite a few new people identify themselves.

THE COURT: Well, it's one drug, right?

MR. BERMAN: That's right.

MR. WEXLER: It's one drug.

THE COURT: It's one drug. And the issue at the end of the day is, even if I direct out Oregon and Florida, I've got a class certified. So what does that do? Has anyone looked up what that does to those two people as class representatives? Let's assume I say that the defendants are exactly right, that there's no cause of action in Florida,

but I've already certified a class. Does that mean that they are now -- what's the right word? -- no longer qualify as class reps? Or do they, because it wasn't raised before, do they continue -- I'm going to have to look it up too -- do they continue to be adequate class representatives?

MR. BERMAN: I've seen some courts say that because they no longer have a claim, they're no longer typical. I've seen some courts say that they still can represent the class because they have the same incentives to protect that class.

THE COURT: Do we know what the First Circuit has done? I think that's just something we probably should all look at.

MR. BERMAN: I think what the manual says, if that happens, if you have a headless class because of this

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problem, that courts generally try to find another class representative, since you've certified the class.

THE COURT: All right, so that's what you're telling me you would want to do rather than risk this --

MR. BERMAN: Yes, your Honor.

THE COURT: -- on a split court situation, is that right?

MR. BERMAN: That's correct.

THE COURT: All right, if anyone wants to file a two-page brief within a week, you know, just giving me a key case or two on what happens if Mr. Wise is correct, we need to do that.

Now, is there anything else you wanted to say?

MR. WEXLER: No, not based on your questions, your Honor.

THE COURT: Anything else AstraZeneca wanted to say?

MR. WISE: No, thank you, your Honor.

THE COURT: All right. My theory of life is going to be is that I have enough on my plate. I will rule on the crosscutting issues. I will rule on the specific AstraZeneca issues. I am not likely to get to the other issues, company-specific issues, until your company is up at bat in terms of the trial, and then I'll be very focused.

This notice, class notice, when does that need to

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go out?

MR. BERMAN: Well, in order to make the national buys, we need to get it out --

THE COURT: The national?

MR. BERMAN: The national buy. We're going to have a national publication, so we have to notify those magazines that we want to get space in their magazine, and there's a certain lead time.

THE COURT: Which is? This is the first I've heard about this.

MR. BERMAN: So we need to get that notice to them, you know, in the next three to four weeks and to begin reserving time. We could start doing that, I think.

THE COURT: So -- this is getting my heart beating very rapidly -- so this means I need to rule within a month.

MR. BERMAN: Well, we've given them the form of the notice.

THE COURT: Well, yes, but what you're saying is, you don't want to send it out until you see how I rule.

MR. BERMAN: Well, we're trying to get it teed up so that we can present it to your Honor for a ruling, that's correct. We can't send it out until you rule on the issue of the form of the class notice. On the issue of summary judgment, we can get it out before you rule.

THE COURT: Right, but we're now so close.

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MR. BERMAN: Well, if we wait until you rule -- I'm not trying to pressure you into ruling -- then the problem is, it may be so late, if you don't rule until July or so, we have to give people an opportunity to opt out.
THE COURT: I'm sorry, I've been so focused on summary judgment. So we haven't sent out a class notice yet?
MR. BERMAN: That's correct.
THE COURT: And that's because you must have been waiting till the summary judgment.
MR. BERMAN: No. We were waiting --
THE COURT: Why haven't you --
MR. BERMAN: Because we were hoping, because this is a complicated process, to combine the notice of pendency with the notice of -- involving another defendant, so we can do two things at once.
THE COURT: Who? What do you mean "another defendant"?
MR. BERMAN: The defendant who's not arguing at the moment of the original five.
THE COURT: This is like The DaVinci Code, right?
(Laughter.)
THE COURT: So this puts me in a bad spot. So just let me understand this, the dynamic here. This may be the most critical thing I do here. So in order -- what do we
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have, a September 18 trial date?
MR. BERMAN: September 28.
THE COURT: So is there some rule I'm not familiar with that says the notice has to go out X amount of time before the trial?
MR. BERMAN: No. It's just a reasonable time to give people time to opt out.
THE COURT: Well, all right. And what do the courts say that's got to be? That's got to be 30 days? What does it have to be, 60 days? What is it typically?
MR. BERMAN: Thirty to 60 days.
THE COURT: I mean, these people, just as a matter of definition, are older and sick. Now, the third-party payors can get out quickly. I'm not so worried about them. But at least with respect to the AstraZeneca people, which is September 28, I need to give them, you know -- I think 30 days would be rough, particularly over the summer, right?
MR. BERMAN: That's correct.
THE COURT: So maybe 60 days, just working backwards? Does this all sound right to you? So September, August, July. And when can you get it into the publications?
MR. BERMAN: We could get it into the publications by July, early July.
THE COURT: So when do I have to rule by?
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MR. BERMAN: June, mid-June.
THE COURT: Mid-June?
MR. BERMAN: Not on summary judgment; on the form of the notice. We need to get your approval of what the notice looks like and to how we're distributing the notice.
THE COURT: With respect to the party that shall not be named, can't that be a second notice?
MR. BERMAN: Well, we were hoping it would not be. It's not going that fast. I've sent Mr. Wise a draft of the pendency. We hope to reach agreement. If we can't reach agreement in the next few days, we're going to file a motion to get the process going.
THE COURT: I guess at this point we're just so

close, if you were to send out a notice and then if I were to rule for summary judgment that way, that's sort of -- it's not a good thing to do in terms of the justice system.
MR. BERMAN: Well, but normally, when the notice goes out, summary judgment is way down the line. People have no idea whether they're going to be, you know, in or out because of an adverse summary judgment ruling.
THE COURT: I know, but then people are opting out of a class that doesn't exist anymore. So you think I need to rule by the end of June, is that it?
MR. BERMAN: On the summary judgments? Yes.
THE COURT: So even just a thumbs up/thumbs down,

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even without an opinion?
MR. BERMAN: If you think that's important for people who are considering whether to opt out, yes.
THE COURT: Well, you don't want to send it out and then have people get all ginned up about it. It's just not the way you should run it now that we're so close up against it.
MR. BERMAN: I understand.
THE COURT: So just so I understand, the drop-dead date for the publication is when?
MR. BERMAN: Early July.
THE COURT: All right. And people probably take vacations around July 4, right? So I just want to script this in advance. Have you exchanged with them the form of the notice?
MR. BERMAN: Yes.
THE COURT: With and without the party that shall not be named?
MR. BERMAN: Yes.
THE COURT: Okay. Do they all know what you're talking about?
MR. BERMAN: Yes. They should.
MR. WISE: We do, your Honor. We have just recently gotten that within the last week or so, I think, and there are a lot of issues, as you might imagine. This is a,

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as you know, a bit of a novel class structure. And the first version of what we got from the plaintiffs attempted to be a notice for all companies, for all products, for all of the track one companies, and there are issues about whether that would even work or whether it should be company by company or -- and we have started that process to try to, you know, gather our thoughts and sit down with them and see if we can't come to a resolution what the notice should look like. That process is starting.
THE COURT: Well, that should happen, and any disputes should come to me by when?
MR. BERMAN: Middle of next week?
MR. WISE: Maybe a couple of weeks?
THE COURT: Here's the issue: The good news is, my son is graduating from college, but it really puts me out of whack for the second week in June. So what I don't want is -- what's that? So that puts us either within the next two weeks or the third week in June. And so if there are any disputes, we need to get people back in here.
MR. BERMAN: And I would prefer it to be sooner rather than later.
THE COURT: So can we say that any disputes will be presented to me within fourteen days?
MR. WISE: We could try to do that.
THE COURT: On the notice? Just the notice, so at

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least it will be ready to go regardless -- and if I moot it

out, it's mooted out; but if I say "go," it would go, but we're not starting then. Does that seem reasonable? Is anyone opposed to that in any of the tracks? Or is this just going to be AstraZeneca?

MR. WISE: We'll have to talk about that. It might make sense to make this a one-company project.

MR. BERMAN: Well, as we drafted it, it's for all of these as opposed to --

THE COURT: Just the track one?

MR. BERMAN: Track one, because we don't want to do this five times. It's very expensive.

THE COURT: I hear you. I'm understanding that. And then there will probably be a second opt-out chance, right, if there's either a -- how does the second opt-out work? There's a settlement and --

MR. BERMAN: The second opt-out usually works in the context of a settlement.

THE COURT: And so the second opt-out is only a settlement, right?

MR. WISE: It's under the new Rule 23.

THE COURT: Under the new rule. I've not worked with it before. So I think that's right, there's a second opt-out period. So that would have to be provided for in the notice?

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MR. BERMAN: Only if there was a settlement.

THE COURT: Right.

MR. WISE: Well, I think that probably is covered in the first notice as well.

THE COURT: Can I see you all at side bar for a minute.

(Side-bar conference held.)

THE COURT: Okay, so you, Mr. Berman, were discussing with me --

MR. BERMAN: Yes, your Honor.

THE COURT: -- that there's a trial coming up, and you wanted something.

MR. BERMAN: Well, what we would like is, we're thinking through just a lot of issues. There's hundreds of exhibits. There's witness issues. We think we need -- I know you're very busy, but we need soon -- and I know I'm being presumptuous because there's summary judgment motions pending that haven't been decided -- but we need a trial conference with your Honor, like an hour.

THE COURT: All right, first I'm going to get through summary judgment, and then I'm going to get through the notice, and then you will get a trial conference, probably sometime in July. That's two months in advance. Most pretrial conferences are a couple weeks in advance.

MR. BERMAN: That's perfect.

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THE COURT: But I'm not prepared to do that right now, so --

MR. HAVILAND: Your Honor, on summary judgment, the plaintiffs have two affirmative motions that affect AstraZeneca, so if your Honor would like to hear on those two. One is the affirmative defenses motion, which is already fully briefed, and I think the papers pretty much speak to the issues of what the Court has to do in terms of the nine remaining defenses.

THE COURT: While you're doing it, it did strike me -- we didn't focus on it because it only knocked out part of the case -- but with respect to the third-party payors, there would be, at the very least, a jury issue on what they knew or should have known with respect to Zolodex.

MR. HAVILAND: And that, your Honor, may be a

Class 2 issue, not a Class 1 issue, by the defendants' own admissions.
THE COURT: But aren't I doing both of these?
MR. HAVILAND: Yes, your Honor.
THE COURT: So that's a serious issue.
MR. HAVILAND: It may be.
THE COURT: Do you know whether the third-party payors, like Blue Cross-Blue Shield, were also purchasers of Zolodex?
MR. HAVILAND: Yes, your Honor.

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MR. BERMAN: They were, your Honor.
THE COURT: So why wouldn't that --
MR. BERMAN: Because in this class that's going to trial, they had no choice but to pay based off a statutory scheme. What they knew in Class 1 and 2 is not relevant.
THE COURT: Well, yes, it is as to when they brought the suit. It wouldn't bar them from recovery, but it would affect how far back they could recover.
MR. BERMAN: Correct.
THE COURT: So, I mean, that seems fair. That's why I was going to take it drug by drug. And so with respect to Zolodex, if in fact any company was purchasing, I'm going to have to deal with the effects of that in a class because that would put you on inquiry notice. If you're paying one price and you see that the statutory AWP price is a different one, that would be inquiry notice. What's it, the -- you should have engaged in inquiry at that point, right? So --
MR. HAVILAND: That's the statute of limitations defense, your Honor.
THE COURT: Right.
MR. HAVILAND: And obviously that issue would go to the Class 2 plaintiffs. There's been no contest, no evidence that the plaintiffs in Class 1 knew or should have known at any point in time.
THE COURT: Right, Class 1 is different.

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MR. HAVILAND: And if I may wrap up the argument on the affirmative defenses, we're down to nine, mercifully. We've gone from 58 to nine, so I think the housekeeping has been done. Five of those nine, though, your Honor, two of which you addressed today, is the political question doctrine.
THE COURT: Right, that's gone.
MR. HAVILAND: The other, the filed rate doctrine --
THE COURT: Gone.
MR. HAVILAND: -- I believe five have been covered by your Honor's ruling, the government action, state action.
THE COURT: What's left?
MR. HAVILAND: Superseding intervening cause, which there's been some discussion of.
THE COURT: Right.
MR. HAVILAND: Preemption, which we believe --
THE COURT: Those are all legal. I've ruled on all those.
MR. HAVILAND: I believe so too, your Honor, so --
THE COURT: But they need to preserve them for the record for appeal, if they got that far.
MR. HAVILAND: Understood.
THE COURT: They can't drop them. I'm just not going to rewrite an opinion on them. So what's left that I

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haven't ruled on?
MR. HAVILAND: Of those, we have four: Statute of limitations, your Honor. The failure to mitigate, again,

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there's no evidence on the part of Class 1 plaintiffs, or even in the Class 2 plaintiffs, on failure to mitigate. The issue of statute of limitations overlaps, I suppose, in the sense of when the case should have been brought, but there's been no evidence put in the summary judgment record of a failure to mitigate on anyone's part. Again, as Mr. Berman points out, in Classes 1 and 2, the statutory regime governs. It's the 20 percent copay class. We pay based on AWP. There's no negotiation.

Compliance with regulation I believe is also covered by prior rulings.

THE COURT: And what's the last one?

MR. HAVILAND: Good faith or conformity with standard industry practice, I don't quite know what that one is.

THE COURT: Well, sure, it refutes it, the deception and fairness, which will go to either a jury or me.

MR. HAVILAND: And most of those issues, your Honor, fall in that rubric. They're really saying there's a lack of proofs on the plaintiffs' part, not really a defense, so --

THE COURT: Were you planning on calling Scully or

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someone like that, some government witness to trial, either side?

MR. HAVILAND: We were not, your Honor. We don't believe that the government knowledge defense even comes into the trial of the case.

THE COURT: Well, it may be in terms of -- it may not be a legal bar, but it may be relevant to their state of mind. I didn't know if either side was planning on calling a government witness currently or a former government witness. But don't forget about the regulations, if the person is currently in the employ of the government, that that will take two or three months to work through. Do you know what I'm referring to? All right.

MR. HAVILAND: Lastly, your Honor, the issue of the plaintiffs' motion for partial summary judgment on AstraZeneca's guilty plea.

THE COURT: What do you want me to do with it?

MR. HAVILAND: Well, your Honor, I think the law is very clear that there's an estoppel that's appropriate here. AstraZeneca pled guilty to conspiracy with doctors in three states, three of which are in the class, and interestingly the discussion of Florida law --

THE COURT: But to hand out samples, right?

MR. HAVILAND: Yes, your Honor, but we believe that's the core part of the return-to-practice fraud that was

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alleged in the complaint.

THE COURT: Well, what would be -- but, you know, I had one of those doctors, actually, in the Lupron case.

MR. HAVILAND: Oh, okay.

THE COURT: So that tended to be handing out samples and saying you can charge for them. It was a different kind of case than the AWP. You're saying that there's something that was directly an AWP plea of guilty?

MR. HAVILAND: Well, it was absolutely the same conduct, your Honor.

THE COURT: The same conduct as what, the samples or the AWP?

MR. HAVILAND: Both. Your Honor, they were providing samples for a hundred percent return to practice. In this case, we focused a lot on the spread. Here we have a zero acquisition cost, AWP, a hundred percent spread. It was another way these manufacturers in their marketing and sales

fraud got doctors engaged in buying the product.
THE COURT: But what's the summary judgment on? What would I be granting it on?
MR. HAVILAND: We think that the core facts in the information, AstraZeneca's information, should be deemed admitted; and they are that AstraZeneca engaged in a conspiracy with doctors to provide samples, knowing and expecting that they would bill for them, and in fact charged

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patients and the insurers in this class for those samples, and ultimately caused economic harm.
THE COURT: Well, that might be some evidence of state of mind, but that's not on any element or claim in the case.
MR. HAVILAND: It is, your Honor, in terms of the fact we have said that these are unfair and deceptive acts or practices. The marketing fraud in part is the fact that they provided these samples for a hundred percent return, not just spread.
THE COURT: Well, that may be admissible. Just I don't think it resolves one of the claims. In other words, you don't win based on that.
MR. HAVILAND: Oh, your Honor, I'm not suggesting that. I'm saying that what we're trying to avoid here is -- winnow down the trial so that what AstraZeneca has admitted in its plea in Federal Court in Delaware does not get relitigated. We've had some testimony in the case by AstraZeneca executives saying, "Well, I understand --"
THE COURT: So you're not going to want any testimony on this?
MR. HAVILAND: Well, we were trying to avoid --
THE COURT: So you don't want to introduce testimony on this?
MR. HAVILAND: Oh, I certainly do, your Honor.

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THE COURT: That's what I thought.
MR. HAVILAND: But I want to make sure that we don't have to chase rabbits down holes in terms of where this fraud went. The Robinson case, your Honor, I'll direct to your attention, it's the District of Maine decision, I think really covers the issue we put before you.
THE COURT: Thank you. Did you want to say anything about this?
MR. WISE: Your Honor, just briefly. On the affirmative defense point, I think it's premature to be seeking your time on that, I really do, particularly in light of the fact that we're not quite sure who or what may be the class representative with respect to us and what state law is going to be advanced as the basis for his claim. So I don't think there's a need for you to spend time now. I think that's all premature. We need to finally know who the plaintiff is who's got a claim that we're evaluating before we decide what state law defenses might be available to us.
On the plea, if you wanted more on the plea, Ms. Harris is here, who's studied all the plea documents in great detail and can address those issues.
THE COURT: Well, just so you didn't come up here for nothing.
(Laughter.)
MS. HARRIS: Your Honor, I think your instincts are

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exactly correct, though. There is nothing here on which to grant personal summary judgment. I mean, Rule 56(d) is designed if you're going to establish or eliminate an element of the claim or an element of the defense. The very narrow facts underlying AstraZeneca's plea allocution do not

establish any element of the plaintiffs' claim, nor do they eliminate any defense from AstraZeneca.

THE COURT: Would they be admissible?

MS. HARRIS: Oh, we would argue at another time when evidentiary questions are before your Honor that it's not admissible because, number one, we don't think it's relevant at all to their claims. Their own expert does not even discuss at all free samples in connection with his evaluation on liability and damages on AWP "inflation." So it's not relevant to the claim that they're presenting to the Court about excessive spreads and AWP inflation. Their own expert doesn't even evaluate it.

And Mr. Howe and Mr. Townsend, there's absolutely no evidence in the record at all that either of those plaintiffs, should they survive our summary judgment motion, ever received or was billed for a sample. So it's just not relevant to the claims that are before your Honor at AstraZeneca's trial.

And, moreover, even if it was relevant, we would argue it's unfairly prejudicial for them to try to admit a

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plea into the trial. But, again, that's a question for a different day. It's an evidentiary question, there's briefing on that, and it raises a whole host of different issues that their requests now for partial summary judgment are nothing.

THE COURT: Good. All right, well, thank you. I just wanted to make sure you came up here, said your piece. And what we'll do is, I'll take it under advisement. We probably should set another hearing now, even if I cancel, on the notice issue because you've got me worried, like the third week in June? Then you two can internally work out -- I think no one's going to want to be here July 4 week, so, Mr. Alba, like that third week of June. I'm going to say the week of the 22nd, something like that? We can either do 3:30 on June 22, or we could do pretty much any time the following week.

MR. WISE: Could I vote for the following week?

THE COURT: How about 3:00 o'clock on the 26th? It's a Monday.

MR. WISE: Fine.

THE COURT: Is that acceptable to people? I'm sparing you all 3:30 on a Friday afternoon.

MR. SOBOL: June 26?

MR. WISE: This is if we cannot reach a joint view on how this should go --

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THE COURT: Right. Otherwise I don't want you here.

MR. WISE: We'll get papers to you within two weeks of today, and we'll appear before you on that Monday afternoon?

THE COURT: Yes, if there's a dispute. I don't know what else to do really. All right, thank you very much.

(Adjourned, 4:35 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 73 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical Industry Average Wholesale Price Litigation, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 30th day of May, 2006.

_____
LEE A. MARZILLI, CRR
OFFICIAL FEDERAL COURT REPORTER

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL No. 1456
THIS DOCUMENT RELATES TO ALL ACTIONS.	Civil Action: 01-CV-12257-PBS Judge Patti B. Saris

PLAINTIFFS' ONE-PAGE SUPPLEMENT TO THEIR SUR-REPLY IN OPPOSITION TO ASTRAZENECA'S MOTION FOR SUMMARY JUDGMENT DISCUSSING TWO DISCRETE ISSUES REQUESTED BY THE COURT

Neither *PNR, Inc. v. Beacon Prop. Mgmt.*, 842 So. 2d 773 (Fla. 2003) ("*PNR*") nor *Millennium Communs. & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256 (Fla. Dist. Ct. App. 2000) ("*Millennium*") hold that the Florida Deceptive Uniform Trade Practices Act ("FDUTPA") contains a requirement that a representation be "likely to affect a consumer's choice." That language likewise does not appear in the FDUTPA or any other Florida case interpreting the statute.

The requirement that a representation be "likely to affect a consumer's choice" is an Federal Trade Commission standard stemming from *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (F.T.C. 1984), an opinion in which the Commission defines materiality in a number of ways, including, among many others, a misrepresentation or practice that is "likely to affect a consumer's choice." *Id.*, at *187. ***No Florida court interpreting the FDUTPA has ever adopted this language.***

It would also not make sense to use the language in *Cliffdale* to interpret the FDUTPA. Because the FTC is acting in a law enforcement capacity and is not suing on behalf of a Class of individuals or entities, the Commission has to "raise a presumption of reliance" by showing: (1)

the defendant made material misrepresentations likely to deceive consumers, (2) those misrepresentations were widely disseminated, and (3) consumers purchased the entity's products. *FTC v. Freecom Communs., Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005). By virtue of having this requirement, the FTC has been particularly strict in defining what representations are "material." However, as plaintiffs showed in their Sur-Reply, Florida law has ***neither a*** reliance nor a materiality requirement; therefore, the question of affecting consumer choice has no relevance in interpreting Florida law in a case, like the one here, brought by private plaintiffs.

WHEREFORE plaintiffs respectfully request that this Court DENY AstraZeneca's Motion for Summary Judgment.

DATED: June 5, 2006

By **/s/ Steve W. Berman**

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on June 5, 2006, I caused copies of **PLAINTIFFS' ONE-PAGE SUPPLEMENT TO THEIR SUR-REPLY IN OPPOSITION TO ASTRAZENECA'S MOTION FOR SUMMARY JUDGMENT DISCUSSING TWO DISCRETE ISSUES REQUESTED BY THE COURT** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman
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